

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

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5 In the Matter of:

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7 SEARS HOLDINGS CORPORATION,

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9 Debtor.

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12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

16 October 26, 2021

17 10:04 AM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: JUSTIN WALKER

1 HEARING re Notice of Agenda of Matters Scheduled for Hearing
2 to be Conducted through Zoom on October 26, 2021 at 10:00
3 a.m.

4
5 HEARING re Status Conference - Status Update on Debtors'
6 Progress Toward Effective Date

7
8 HEARING re Amended Notice of De Minimis Asset Sale
9 Cheboygan, Michigan (ECF #9870)

10
11 HEARING re Opposition and Bid (ECF #9964)

12
13 HEARING re Future Tort Claimant Diana Arney's Motion oft
14 Court to Take Judicial Notice of Litigation Involving
15 Electrolux-Manufactured Dryers with Ball-Hitch Design (ECF
16 #9966)

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25 Transcribed by: Sonya Ledanski Hyde

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1 P R O C E E D I N G S

2 THE COURT: Okay, good morning. This is Judge
3 Drain. We're here in In re Sears Holdings Corp., et al.

4 I have the notice of agenda and I'm happy to go
5 down that in order. The first matter on the agenda is the
6 Debtors' status report on their effort to achieve the
7 effective date in these cases. The Debtors have been
8 issuing these status reports now periodically for some time.
9 The most recent one was filed I believe on the 19th of
10 October.

11 So I'm not sure who from the Debtors is going to
12 be discussing this.

13 MR. FAIL: Good morning, Your Honor. Garrett
14 Fail, Weil, Gotshal & Manges for the Debtors. Are you able
15 to hear me?

16 THE COURT: Yes, I can hear you and see you fine.

17 MR. FAIL: Thanks very much, Judge.

18 At the last hearing, you asked the Debtors to
19 provide an update today regarding ongoing discussions with
20 multiple parties as it relates to emerging strategy for
21 these cases. To that end, the Debtors have coordinated with
22 those parties in advance of today's report.

23 As requested, the Debtors filed the presentation
24 you referenced on the docket one week ago. For those
25 following along, it's at Docket 9979. I'll walk the Court

1 through that now and then conclude with some additional
2 remarks.

3 Starting at Page 1 of the report, Your Honor, the
4 chart shows that claims that have been -- the chart shows
5 the claims that have been satisfied in full post-
6 confirmation. It's 1,068 claims, which is more than two-
7 thirds of the 1520 allowed opt-ins and non-opt-out claims.

8 The chart also shows that the Debtors settled and
9 allowed post-confirmation approximately 452 additional
10 claims. It shows that the Debtors paid these claims \$42.4
11 million, and that the Debtors owe \$41 million on account of
12 these claims, so that the Debtors paid more than one-half of
13 what they owe on these claims to date in the aggregate.

14 The number of allowed claims receiving
15 distributions is up slightly, approximately nine, from the
16 last report, and the amount remaining to be paid is down
17 slightly, approximately 1.2 million from the last report,
18 all in a positive direction.

19 The chart then shows approximately 92 claims are
20 subject to preference actions; that number is down
21 approximately 19 from the last report. That's a result of
22 judgments that have been entered in the preference actions.

23 The chart shows that there are 35 non-opt-out
24 claims remaining to be reconciled; that number is down also
25 approximately five from the last report. Again, all

1 positive directions.

2 The chart shows that there are about 123 opt-out
3 claims remaining; that's down about 31 in number and down
4 about \$11.3 million from the last report, continued (sound
5 glitch). The Debtors reconciled and estimate they will
6 allow about one-third of those in number. The Debtors have
7 filed objections already to the remaining two-thirds in
8 (sound glitch).

9 The chart shows that there are two claims that
10 assert about \$1.4 billion that the Debtors have gotten
11 disallowed, but that is subject to appeal.

12 Those claims are referenced to show that the work
13 being done to preserve this Court's order and the District
14 Court's order is necessary to prevent the priming or massive
15 dilution of every other remaining claim.

16 The chart also shows the Debtors estimate the
17 total amount they will need to pay all remaining
18 administrative expense claims is \$54.2 million; that's down
19 2.6 million from the last report.

20 The chart then goes on to show the number and
21 asserted amounts of priority tax, priority non-tax, and
22 secured claims. The takeaways here are as follows: The
23 Debtors' estimates of allowable amounts remains the same,
24 \$45.5 million.

25 The Debtors have filed objections already this

1 month to disallow or declassify the majority of priority
2 claims. Your Honor knows that in the past, we filed our
3 written reports the day of the hearing because work
4 continues to be done through and up to the morning of the
5 hearings and we've tried to provide the latest numbers and
6 the clearest pictures at these hearings.

7 So as an update to the report that we filed, I'll
8 give you the latest. The Debtors have objected to
9 approximately 30 priority tax claims that were listed as to
10 be reconciled last week. The Debtors estimate that there
11 are approximately 137 priority tax claims to be reconciled
12 after that.

13 The Debtors also objected to a total of
14 approximately 1,112 priority non-tax claims, about 72 more
15 that were listed as to be reconciled in the report last
16 week. The Debtors estimate that there are approximately 110
17 priority non-tax claims remaining to be reconciled after
18 that.

19 So the Debtors have objections pending to more
20 than 82 percent of the remaining priority claims that the
21 Debtors have to resolve in order to get down to their
22 estimate.

23 There are another 1300 plus claims that the
24 Debtors identified that will share in a \$3 million claims
25 recovery. Additional work will need to be done to allocate

1 each creditor's share of the \$3 million, but the Debtors are
2 not undertaking that work currently.

3 In terms of secured claims, Page 1 on the chart
4 show that as a result of the Debtors' objections to claims,
5 the count came down by more than half since the last report
6 we gave in July. But as the chart indicates, additional
7 work is necessary to prevent the massive priming or massive
8 dilution of every other remaining claim in the case.

9 Since the filing of the report last week though,
10 the Debtors filed objections to disallow or reclassify as
11 general unsecured claims approximately 192 (sound glitch)
12 claim; that's about 50 percent in number of the 392 claims
13 listed on the report as to be reconciled.

14 In terms of dollars though, the objections that
15 the Debtor has filed will eliminate more than \$34.46 billion
16 of the secured amounts, leaving 200 claims asserting only
17 \$51.2 million to be reconciled.

18 So pausing a moment to consider the work that
19 we've done to get to this point, the Debtors started with
20 more than 9500 claims and ballots asserting more than \$65
21 billion dollars in administrative, priority, or secured
22 claims.

23 The Debtors worked with creditors and worked
24 through the Court process to entirely eliminate thousands of
25 claims and ballots and eliminate administrative, priority,

1 and secured claims asserting tens of billions of dollars
2 that would have primed or massively diluted the remaining
3 claims. These numbers show this was not a case where the
4 Debtors' professionals had a clean claims register at
5 confirmation.

6 In addition, as the Court and parties in interest
7 know, this was a mega-retail case. The number of parties in
8 interest, largely unfamiliar with Chapter 11 concepts, was
9 massive. Confirmation was only one year after the case was
10 filed. Confirmation was six months after the prepetition
11 bar date was set. To date, there have been over 26,500
12 claims filed that the Debtors sorted through on last review.

13 The call for unpaid administrative claims ballots
14 came only after confirmation, and the bar date and claims
15 reconciliation all came after the Debtors sold all of their
16 assets and transferred all of their employees, essentially
17 all of the company's resources.

18 If Your Honor will turn to Page 2 of the report,
19 this page and the next page shows that this was not a case
20 where the Debtors had liquidated all of their assets and had
21 cash in hand at the confirmation date.

22 It shows that even at this point in these cases,
23 the value of the Debtors' remaining assets, excluding the
24 ESL and preference litigation, is more than three times than
25 net cash on hand. It shows that work remains to be done to

1 liquidate and to monetize the Debtors' remaining assets to
2 deliver recoveries to creditors. It shows that the
3 projected recoveries are greater than the cost of pursuing
4 the recoveries. It shows what will be lost if resources
5 were not and are not allocated to collect them.

6 Let's look at the specifics. Page 2 shows the
7 Debtors' cash balance and the reserve from that cash for
8 disputed administrative claims. It shows that the Debtors
9 estimate \$3 million of recovery from the Debtors' 12
10 remaining real estate assets. This is an increase in the
11 estimate from the Debtors' last report.

12 It also shows \$39 million in other proceeds, which
13 includes the Debtors' estimates of recoveries of unclaimed
14 property from a Calder statue that we own or dispute, from
15 what's been referred to as PTAB appeals, and from Transform,
16 including the (sound glitch) that's subject to appeal in
17 these cases. It also includes certain state tax refunds.

18 Note that if all of these are essentially
19 litigation proceeds, none of the defendants who are parties
20 were willing to pay the Debtors' (sound glitch) litigation,
21 forcing the Debtors to direct resources to pursue financial
22 recoveries.

23 The claim number on Page 2 are tied to the numbers
24 on Page 1.

25 THE COURT: So can I interrupt you on the assets.

1 MR. FAIL: Yes, sir.

2 THE COURT: With the real estate, the estimated
3 remaining assets are 42.1 million. When you look at the
4 July report, they are 15.5 million. I think that difference
5 largely explains the difference between the two reports when
6 you get down to the bottom figure on this chart, the total
7 difference between cash available and projected uses, unless
8 I'm missing something. I mean, the July --

9 MR. FAIL: It is not because of the real estate
10 increase, Judge, the \$3 million.

11 THE COURT: No, I'm not talking about the real
12 estate, but the other items listed and the real estate. The
13 real estate is broken out, as is the utility deposit
14 category, which I assume was just in the other proceeds
15 category in the July report.

16 Anyway, the July report lists all of these things,
17 including the real estate, at 15.5 million estimate. And
18 now, it's at 42.1, so just --

19 MR. FAIL: If you look at the July report -- for
20 folks, that's at Docket 9680 --

21 THE COURT: Right.

22 MR. FAIL: -- there's a bullet on the bottom of
23 Page 4 on that that says the difference there is going to be
24 filled by ESL and preference, which was the same, but it
25 also includes the PTAB appeals. And so, what we've done is

1 we've combined a number of different things into the line
2 item for these other proceeds. And so, since the last
3 report, we've included our estimate for the PTAB appeals and
4 litigation against Transform --

5 THE COURT: Okay.

6 MR. FAIL: -- to provide a clearer picture of the
7 assets that we believe we will (sound glitch) and, you know,
8 excluding still from this calculation the ESL and preference
9 litigation.

10 THE COURT: Okay. So it's really the PTAB that's
11 added in. I mean, there are probably some other adjustments
12 too, but...

13 MR. FAIL: You know, the two ones that I'm calling
14 out -- there are other adjustments, but the two that I'll
15 call out are the PTAB appeals and litigation against
16 Transform, including the foreign cash of \$6 million, an
17 estimate for our ability to recovery the \$6 million. It's
18 in an escrow, it's subject to appeal, but that's not
19 nothing, Judge, so we're going to --

20 THE COURT: But you're still not including what's
21 been referred to as the ESL litigation, which is the
22 multiparty adversary proceeding.

23 MR. FAIL: Those were excluded before. They're
24 excluded from this, correct.

25 THE COURT: Okay. All right, sorry to interrupt

1 you, but I think you were then talking about the estimated
2 remaining amounts owed on administrative, priority, and
3 secured claims that are reserves.

4 MR. FAIL: That's right. So the claim numbers on
5 Page 2 do tie to the numbers on Page 1, the uses on --

6 THE COURT: Well, can I ask you about that one
7 too. Because on Page 1, you have a number for priority tax,
8 non-tax, and secured as 45.5, and here, it's 39.9. Is it --

9 MR. FAIL: We note that it is net of reserves for
10 claims. There's some overlap that's really -- so if you
11 look on Page 2 of the report, there is a \$9.8 million that's
12 reserved for claims if we didn't reduce the claims numbers
13 below. And so, the bolded lines have net of reserves, so
14 we're applying a portion of the \$9.8 million.

15 THE COURT: In that category, okay. And then I do
16 note that the April report, which was Docket No. 9445, had a
17 lower estimated number for priority and secured of 36.5
18 million. Is that also because of net of reserves?

19 MR. FAIL: I'm looking at that report, Judge. And
20 can you just point me to what page you're looking at?

21 THE COURT: Sure, Page 4.

22 MR. FAIL: The priority tax one, priority non-tax?

23 THE COURT: Right, and secured. If you add those
24 up, it's 26.5.

25 MR. FAIL: I can tell you, Judge, that we are

1 confident in the new numbers and that they come in within
2 confirmation range, if not below the confirmation range
3 estimates. The numbers have moved around from categories,
4 you know, pre and post over time, as we've kind of sorted
5 through and gone through them.

6 THE COURT: Okay.

7 MR. FAIL: The numbers that we put out in the last
8 two reports, I'm confident, you know, reflect our current
9 estimate, and I think that the work that we are doing to
10 reconcile the claims and bring the actuals down to the
11 estimates -- you know, the actuals closer to the estimates
12 will kind of prove us out to where we're going to be.

13 I'm also informed that the increase is due to an
14 increase in tax claims.

15 THE COURT: Now the secureds, I mean, they
16 actually have -- they have leads on actual existing
17 collateral, as opposed to just tax secureds at some point?

18 MR. FAIL: No. So we've gotten objections on
19 filing granted to several tens of billions of dollars of
20 folks that were asserted. The biggest dollars include the
21 prepetition debt, which at one point, you know, was the
22 second lien debt, some of it was credit bids, some of it
23 was, you know, reclassified to general unsecured, some of it
24 expense, so we're reducing and taking those out.

25 Then there are folks that improperly -- a lot of

1 folks that improperly said that they were secureds when they
2 didn't have collateral of the Debtors. They had their own
3 property, or they just objected on docs, so we're --

4 THE COURT: So basically, you're going through the
5 always difficult task of reconciling tax claims, right? I
6 mean, that's largely what it's coming down to?

7 MR. FAIL: There's some overlap also in
8 prepetition priority, post-petition administrative, and
9 secured. The taxing authorities like to cover their bases
10 and check all their boxes, you know. I think we will speak
11 with the administrative claims rep. We will speak with the
12 UCC and the pre-effective date committee.

13 We think we've identified to date approximately
14 200 tax claims that continue to update their files, continue
15 to update their claims, you know, and cause an
16 administrative burden. For about \$2 million, you know, 200
17 claims could be satisfied. If you looked at claims under
18 \$15,000, I think 150 of them could go away for 500-
19 something-thousand dollars.

20 So we're at the point where we are, as you said,
21 doing the difficult task of getting through real estate
22 taxes for what was one America's largest retailers, you
23 know, in every state across the country.

24 And if I told you, Judge, we were dealing with,
25 you know, pre-2002, pre old Kmart bankruptcy folks asserting

1 property taxes, I think you would believe me. It's insane.

2 THE COURT: All right. So then at the end, you
3 basically get to a current shortfall with the reserves
4 obviously and the estimates, which are just estimates on
5 ultimate liquidation of the tax claims of 58.2 million,
6 which is considerably lower than the estimate for July and
7 April, which was between 80 and 81 million.

8 MR. FAIL: That's right. And, Judge, you
9 recognize that the cash numbers turn, the other assets, you
10 know, need to be monetized. We don't have that in hand.
11 The claims numbers is the number, if you wanted to pay it
12 out today, what you need. But the overall 58.2 is if the
13 assets come in where we think and if the claims come out
14 where we think, this is where, you know, the shortfall that
15 you would need. But if you wanted to get it done today and
16 pay out the estimate, you obviously need more than 58.2.

17 THE COURT: Okay.

18 MR. FAIL: Thanks, Judge. And, you know, as
19 you've said and as the note on Page 2 says, you know,
20 consistent with our last report, the Debtors continue to
21 estimate that that difference will be covered by preference
22 claims and ESL litigation.

23 THE COURT: Right.

24 MR. FAIL: Here's another view that shows that at
25 confirmation, the Debtors had \$48.5 million in cash, but

1 that post-confirmation, the Debtors' efforts collected \$90.7
2 million to date, and the Debtors expect their efforts to
3 lead to collection of another \$42.1 million. Again, this
4 excludes preference, and this excludes litigation proceeds.

5 Page 3 also shows the Debtors collected \$20
6 million in cash proceeds from preference settlements to
7 date. This is a slight increase from the Debtors last
8 report, and I'll cover preferences in a little more detail
9 later in the presentation.

10 Flipping to Page 4. Page 4 shows an update on
11 uses. The total uses was increased slightly as a result of
12 the extended estimated timeframe for the cases. The prior
13 reports included estimates through 12/31/21. This current
14 report includes estimates through 6/30/22.

15 Importantly, Judge, the new total estimate of
16 total uses, which is 259.3, is still well within the
17 confirmation date estimates of uses, which was 210 on the
18 low end and 278 on the high end.

19 Finally, Page 5 gives additional details on the
20 status of preference actions. We disclosed on the prior
21 pages that efforts yielded \$20 million in cash recoveries to
22 date. We also disclosed on Page 1 that the Debtors
23 benefited from the elimination or reduction of approximately
24 \$23.4 million in administrative claims as a result of
25 preference settlements or judgments to date.

1 The Debtors' preference teams have settled
2 approximately 68 percent of eligible matters. There are
3 still approximately 715 eligible matters that are open. The
4 total amount of the preferential transfers for those matters
5 is about \$353.5 million.

6 The Debtors wish that these actions would be
7 resolved quickly and without prolonged litigation. We're
8 sure that the Court does as well. Unfortunately, though,
9 that requires agreements from defendants.

10 The Debtors' professionals have spent a
11 significant amount of time post-confirmation updating
12 parties in interest on the steady forward progress of these
13 cases. In prior reports, we've covered in detail how we got
14 to where we are.

15 The Debtors have been continuing to work with the
16 pre-effective date committee and the professionals for the
17 UCC and the administrative claims representative on options
18 for going forward, including options for a plan effective
19 date. Those parties have been working productively,
20 discussing the various options and different points of view.

21 The Debtors understand that those parties too have
22 had numerous discussions with their constituents, as well as
23 other parties.

24 The Debtors view the options to include paths that
25 do not put any creditor in a worse position than they are

1 currently. They include options to incentivize allowed
2 claimholders and options to incentivize or otherwise address
3 parties with disputed claims.

4 For obvious reason, given the public nature of
5 this report and the ongoing nature of discussions, I will
6 not go into more details at this point. The Debtors are
7 optimistic, however, that all parties in interest will
8 recognize that the best path forward includes pursuit of the
9 remaining assets.

10 If there is no requests before the Court today,
11 all parties in interest are reserved. As the Court has seen
12 time and time again in these cases, the cost of addressing
13 objections that ultimately get overruled are significant in
14 terms of dollars, distraction, and delay.

15 The Debtors have the means to continue operating
16 as Debtors-in-possession and look forward to working with
17 various constituents to conclude these cases as efficiently
18 as possible. The Debtors will disclose material updates on
19 asset recoveries and paths to resolve these cases as they
20 develop.

21 Your Honor, that concludes the Debtors'
22 presentation this morning. Unless Your Honor has any
23 questions, I propose to return back to the agenda and move
24 to the next item.

25 THE COURT: Okay. Well, the purpose of these

1 reports is not just for enabling me to ask questions, but to
2 have it aired on a public basis so that the progress towards
3 the effective date of a plan or alternatives can be
4 evaluated.

5 It is the case now, as it was the case for the
6 last two reports and for all of the reports, that on a cash
7 basis, the Debtor is administratively insolvent. On the
8 other hand, it appears to me -- and again, I'm seeing these
9 reports and nothing else -- that the money that the Debtor
10 is spending to resolve claims would have to be resolved in
11 any case, whether the case remained in its current posture
12 or was converted, for example, to Chapter 7.

13 So it seems to me that the money that is being
14 incurred to liquidate claims and realize on the remaining
15 realizable assets is being spent in an appropriate way, but
16 I guess that is really what the parties need to focus on
17 privately. Any creditor is certainly free to settle its
18 claim for a lesser payment if other creditors are not
19 disadvantaged by that.

20 But I don't, from these reports, see a need for
21 any dramatic change from the path that the Debtors are on at
22 this point.

23 MR. FAIL: Thank you.

24 THE COURT: Okay. But obviously, that requires
25 serious monitoring and that's what you're doing, it appears

1 to me.

2 Okay. So unless anyone has anything further to
3 say, I'll turn to the two other matters on the agenda. And
4 I'll note that a number of matters were adjourned, I'm
5 assuming because, in large measure, that's consistent with
6 the process that Mr. Fail has described in terms of
7 reconciling claims and the like.

8 MR. HARNER: Your Honor, it's Paul Harner, the fee
9 examiner, with apologies for the interruption. May I be
10 excused?

11 THE COURT: Yes, sure.

12 MR. HARNER: Thank you, Your Honor.

13 THE COURT: Okay. All right.

14 MS. MARCUS: Good morning, Your Honor. If you're
15 ready for me.

16 THE COURT: Yes.

17 MS. MARCUS: Okay. Jacqueline Marcus from Weil,
18 Gotshal & Manges LLP on behalf of the Debtors.

19 The next matter on the agenda, Your Honor, is the
20 amended notice of di minimis asset sale for a property in
21 Cheboygan, Michigan. Your Honor, this is a di minimis
22 matter both literally and figuratively, and I don't want to
23 take up too much of the Court's time with it, so I'll try to
24 be quick.

25 Pursuant to the di minimis asset sale procedures

1 approved by the Court at Docket No. 856, the Debtors have
2 filed numerous notices of proposed sales of di minimis
3 assets. To my knowledge, this is the only one that had
4 ended up in a hearing before the Court.

5 The Debtors filed an amended notice of sale of the
6 Cheboygan property to Princess Riverboats, LLC, on October
7 4th, 2021. The purchase agreement provides for a sale of
8 the property for \$165,000. As reflected on the docket,
9 Third Avenue Associates, Inc., filed an objection and
10 essentially made a bid for \$225,000.

11 The Debtors had determined that the difference in
12 price was not substantial enough to warrant the delay and
13 expense associated with switching to a different buyer, but
14 we advised Third Avenue that we would do that if they signed
15 a purchase and sale agreement provided for a price of at
16 least \$300,000.

17 If Third Avenue had done that, our intent was to
18 organize a mini-auction, which we've done before. We were
19 going to ask the two bidders to submit their highest and
20 best offer simultaneously, and if the two bids were within
21 10 percent of one another, we were going to have a second
22 round of bidding. Despite providing mixed signals over the
23 past two weeks, Third Avenue has not been willing to
24 increase its offer to 300,000, and it has also not been
25 willing to withdraw its objection so that the Debtors can

1 proceed to a closing with Princess Riverboats.

2 The Debtors, Your Honor, in the exercise of their
3 business judgment, are seeking approval of the sale to
4 Princess Riverboats at the \$165,000 price provided in the
5 purchase and sale agreement.

6 I believe Mr. Schlachter is on the call on Zoom
7 and he represents Third Avenue.

8 THE COURT: Okay.

9 MR. SCHLACHTER: Yes, good morning, Your Honor.

10 THE COURT: Good morning.

11 MR. SCHLACHTER: David M. Schlachter, Law Office
12 of David M. Schlachter on behalf of Third Avenue Associates.

13 THE COURT: Good morning.

14 So, Ms. Marcus, let me just make sure I
15 understand. The difference here is \$60,000 between the
16 225,000 that was in the bid. And I think what you outlined
17 is really two potential issues with the bid by Third Avenue
18 Associates, and I just want to make sure I understand them.

19 Is the original buyer, Riverboat, although I think
20 they assigned it to someone else or maybe I have it
21 backwards. I think there's a Hiyawa in the amendment in an
22 assignment agreement. But in any event, let's just go with
23 Riverboat as the purchaser.

24 Are they done with their due diligence? They're
25 ready, willing, and able to close?

1 MS. MARCUS: Yes, they're ready. They are ready
2 to close.

3 THE COURT: Okay.

4 MS. MARCUS: And I'll add that Mr. Schlachter's
5 client has also waived any due diligence.

6 THE COURT: All right. So it's ready, willing,
7 and able to close too?

8 MR. SCHLACHTER: Yes, Your Honor.

9 THE COURT: Okay.

10 MR. SCHLACHTER: And we provided proof of funds as
11 well.

12 THE COURT: So the only issue is -- okay, so
13 that's issue one. But there is no contract, right, with
14 Third Avenue?

15 MR. SCHLACHTER: Well, we signed a contract -- but
16 not for 300 -- for 225, Your Honor.

17 THE COURT: So it's just the price then, I guess,
18 because if you compare apples to apples, there's a contract
19 that's on the same terms and they both waived due diligence.

20 So why would the Debtors be turning down the extra
21 \$60,000?

22 MS. MARCUS: So it's really just the delay and the
23 time associated with getting Third Avenue on board. What we
24 were hoping was to stimulate competitive bidding so that the
25 two parties would go head to head. But the Debtors'

1 financial advisor, M3, who's handling the real estate sales,
2 believed that it was more appropriate to go with the 165 if
3 Third Avenue wasn't willing.

4 It's almost like -- I know we don't have formal
5 bidding procedures, but almost like incremental bidding.
6 What makes it worth their while to hold off. We were also
7 concerned about some opposition from the original buyer, and
8 that's why we had decided it wasn't worth it for 225, but it
9 would be for 300.

10 THE COURT: But if Third Avenue is ready, willing,
11 and able to close on the same schedule as the other one, as
12 Riverboats, then it would seem to me it's just a desire to
13 get them to bid up from what they've already bid up, right?

14 MS. MARCUS: That's correct, Your Honor.

15 THE COURT: I mean, the Riverboat folks knew, I
16 think, that their agreement was subject to Bankruptcy Court
17 approval.

18 MS. MARCUS: Yes, they do.

19 THE COURT: So I cannot approve it in light of
20 this other agreement on the condition that the closing
21 happen by X date, and if not, then you would go forward with
22 Riverboat. I mean, it would be great to get an auction
23 going, I appreciate that, but it would seem to me that
24 60,000 is a pretty meaningful step up here, and you could
25 have an auction starting at 60,000 if you want.

1 MS. MARCUS: We can do that, Your Honor, if that's
2 what you're directing us --

3 THE COURT: I think you need to do that. Look,
4 this is -- I appreciate it's not a great deal of money. But
5 I think the purpose of the di minimis sale order to give the
6 Debtor flexibility to use its business judgment to close di
7 minimis sales that were not objected to.

8 But ultimately if there is an objection and the
9 Court reviews it, one could argue that a prospective bidder
10 doesn't really have standing to object. But I do have an
11 objection before me and I have the facts before me and it's
12 a meaningful increase with, I don't believe, any additional
13 risk given the requirement for Bankruptcy Court approval and
14 the exact overlap of the two agreements, except for the
15 price.

16 So it seems to me that you should give both
17 parties notice of a potential auction to make a simultaneous
18 bid starting at a number north of 225,000 and the winner
19 gets to purchase.

20 MS. MARCUS: We'll do that, Your Honor. Just as a
21 matter of procedure, if we do that, regardless of who the
22 winner is, I don't think we technically need an order under
23 the di minimis asset procedures. We normally don't, but
24 given that there was an objection filed, we could.

25 THE COURT: I think you could just -- I think you

1 should submit an order confirming the winner and confirming
2 my ruling today. The title insurer may want that.

3 MS. MARCUS: Okay. We'll do that, Your Honor.

4 THE COURT: Okay.

5 MR. SCHLACHTER: Thank you, Your Honor.

6 THE COURT: All right. So I don't think this
7 needs to drag out. If the parties' principals are
8 available, I think you should have the bids come in, you
9 know, on a specific day within a week.

10 MS. MARCUS: Sure.

11 THE COURT: Okay.

12 MR. SCHLACHTER: Thank you, Your Honor.

13 THE COURT: Okay.

14 MS. MARCUS: Thank you, Your Honor.

15 THE COURT: Very well.

16 MS. MARCUS: The next matter, Your Honor, is the
17 motion of Ms. Arney at Docket No. 9966. And Mr. Tannen, I
18 believe, will handle that.

19 THE COURT: Right.

20 MR. TANNEN: Good morning, Your Honor. Michael
21 Tannen on behalf of Diana Arney.

22 Having listened to the comprehensive status
23 report, I want to assure the Court that I'm doing my best to
24 get to the heart of the matter and not burden the estate
25 with administrative expenses.

1 So we have filed a motion for you to take judicial
2 notice of various pieces of litigation which involve dryer
3 fires involving ball-hitch dryers manufactured by
4 Electrolux, and we mentioned two of the cases when we
5 appeared before you about a month ago: one was the Roberts
6 nationwide class action, and the other was a suit by and
7 between Sears and Electrolux.

8 And through our continuing investigation, we have
9 learned that there was an effort to consolidate roughly
10 dryer fire cases, many of which were subrogation cases, into
11 multidistrict litigation. We have learned that Sears was
12 named as a party in three of the suits, and we learned that
13 Sears formally opposed the multidistrict litigation.

14 So we sent you a binder of the various pieces of
15 litigation, the orders, the dockets, some of the motions,
16 and we believe that these matters are not subject to
17 reasonable dispute and are capable of accurate and ready
18 determination by you. It would obviate some expense with
19 regard to obtaining actual evidence, and we cited a slew of
20 cases standing for the proposition that a court can take
21 notice of cases pending in other jurisdictions.

22 I would say that the significance of the
23 nationwide class action had to do, in part, with Kenmore
24 dryers being part of the class and future relief extending
25 into 2022 in the form of rebates and future dryer repairs,

1 and so, we're asking that the Court take judicial notice.

2 I wasn't sure about what sort of proposed order to
3 tender to you in the event you agree with our position.
4 There's been no objection filed, and Federal Rule of
5 Evidence 201, we're asking that you take judicial notice.
6 What weight you ascribe to it obviously is up to you.

7 THE COURT: Okay. Well, let me -- I'll note also
8 that there's been no objection to this motion. But you're
9 right, there was no proposed order and I think one needs to
10 be careful with the order.

11 Just as far as context here, when we had a hearing
12 on the underlying request for relief -- and that was
13 Transform or New Sears request that the litigation by Ms.
14 Arney be barred because of the free and clear order -- I
15 stated that there were two potential issues, both going to
16 due process, that might limit the effect of the free and
17 clear order.

18 They involve whether the Debtors knew or
19 reasonably should have known about the claims in the Arney
20 lawsuits, which under the case law including the Motors
21 Liquidation case, would have required actual notice as
22 opposed to publication notice of the sale.

23 And I also noted that conceivably Miss Arney
24 wasn't the purchaser, that she was somehow a secondary
25 purchaser that might have taken her out of the free and

1 clear order under a different segment of the Motors
2 Liquidation case, and I said the parties should discuss
3 discovery on those two issues only and give me a discovery
4 cutoff date as part of a pretrial order. And obviously,
5 that was back on September 27th; it's now October 26th. I
6 don't have a pretrial order.

7 And I'm assuming that this motion to take judicial
8 notice of the three specific litigations is to enable the
9 parties to sort of somewhat streamline that discovery, which
10 makes sense to me. I think that's fine if that's the
11 purpose of it.

12 But again, the judicial notice I'm taking or I'm
13 being asked to take of these three litigations is only as to
14 how they relate to the notice points, I think, right, and
15 not as to the truth or facts asserted in the underlying
16 litigations, which obviously -- and the motion acknowledges
17 this too -- is not a function of judicial notice for or of
18 litigations or lawsuits that were pending.

19 So if the order seeks that type of relief, I think
20 I'm fine with it, but that's just my preliminary review on
21 this. I mean, clearly courts frequently take judicial
22 notice of the existence of litigation in other forums as
23 that fact; the fact of that litigation may bear on matters
24 that are before them.

25 And to me, that's appropriate here under FRE

1 201(c)(2), but I think the order needs to be clear that it's
2 focusing on the notice issue and the existence of those
3 litigations. For example, it wouldn't apply to statements
4 in the litigations as for the truth of those statements, and
5 that could even include, I guess, whether a document
6 actually was served, for example. There'd be a certificate
7 of service on the docket, and I'll note, you know, that it's
8 on the docket, but that doesn't necessarily mean it was
9 served.

10 I've been talking for a while, but that's my
11 preliminary view of this. I'm happy to hear from both of
12 you because I think the focus needs to be on the order, as
13 opposed to the basic request for underlying relief.

14 MR. TANNEN: Your Honor, I can speak with opposing
15 counsel about this. And we had some internal debates in the
16 office about whether we would be providing a proposed order
17 and we decided to ditch that until we heard from you.

18 An example of -- and I don't know if it's a bright
19 line or a continuum what I'm about to say. But the fact
20 that Old Sears filed a motion joining Electrolux's argument
21 opposing multidistrict litigation, which included a
22 nationwide class action involving hundreds of thousands, if
23 not millions, of dryers, is a fact, and the weight that you
24 will ascribe to it, I'm presuming, will be up to you.

25 THE COURT: Right.

1 MR. TANNEN: We were talking again in the office
2 that we think what we've presented is very compelling, and
3 then we get to the prayer for relief and it's kind of like a
4 nothingburger because we don't know what you're going to be
5 focusing on when we filed the motion, but we thought it was
6 significant to bring to your attention. We also didn't want
7 to spend a lot of time establishing the existence of this
8 litigation if you could take judicial notice of it.

9 THE COURT: Right. Okay, very well.

10 MR. BAREFOOT: Your Honor, could I be heard
11 briefly?

12 THE COURT: Sure.

13 MR. BAREFOOT: Luke Barefoot from Cleary Gottlieb
14 for Transform Holdco for the record.

15 Your Honor, we were a little surprised to be
16 before you this morning on this motion. There was -- we
17 were not clear until we received a direction from your
18 chambers that this was going to be on the agenda, given that
19 it wasn't noticed in accordance with the case management
20 order.

21 But to some of the points that Your Honor made,
22 most of what was in this motion was already put before the
23 Court in the -- what I think was styled as a status report
24 that was filed shortly before the last hearing.

25 THE COURT: Right, on the 24th.

1 MR. BAREFOOT: It was -- I apologize.

2 THE COURT: September 24.

3 MR. BAREFOOT: Correct.

4 THE COURT: Right.

5 MR. BAREFOOT: So, you know, it was unclear to us
6 what exactly the form of relief that plaintiffs were seeking
7 by putting those cases, as well as some other, you know,
8 proceedings in other districts before the Court.

9 You know, we're happy to work with Mr. Tannen on a
10 form of order, but what we would object to and what was not
11 clear to us that this was seeking was to end run the
12 discovery that Your Honor had directed at the last hearing.
13 Mr. Tannen has --

14 THE COURT: Well, I mean, this might inform that
15 discovery because the order will show that I've taken
16 judicial notice of the dockets of these three cases. And
17 then you all can, I hope, maybe avoid some additional fact
18 discovery because those dockets will be in the record.

19 But the interpretation of the dockets and anything
20 other than just that these documents are on the dockets,
21 whichever documents anyone wants to refer to when we get
22 back to a hearing on this, I think that should be the extent
23 of the order.

24 I don't want to pick and choose --

25 MR. BAREFOOT: Understood.

1 THE COURT: I don't want to pick and choose from
2 the dockets. I don't want to interpret the dockets. I know
3 there's some bullet points in the motion that suggest that I
4 should take judicial notice of the following things and it
5 kind of describes what they are. I don't want to have that
6 in the order.

7 I just want, I'll just take judicial notice of the
8 three litigations and the dockets in those litigations, and
9 I think that --

10 MR. BAREFOOT: Understood, Your Honor.

11 THE COURT: Right.

12 MR. BAREFOOT: And I just wanted to be heard to be
13 clear that, exactly as Your Honor said, we would disagree
14 with some of the characterizations or conclusions that the
15 plaintiffs would --

16 THE COURT: That's fine.

17 MR. BAREFOOT: -- draw from those, and that will
18 be the subject of discovery.

19 THE COURT: Right, that's right. And so, if you
20 want to put something in that, you know, any other relief
21 requested in the motion is denied, that's fine. And
22 obviously, that doesn't mean that I'm granting the
23 underlying motion by Transform, but it's just the relief
24 requested in the motion is limited to or the relief granted
25 from that request in the motion is limited to the following,

1 and then just say the Court will take judicial notice of the
2 three captioned litigations and the dockets in those
3 litigations.

4 MR. TANNEN: Your Honor, this is Michael Tannen
5 again.

6 There were cases in which Sears was a defendant in
7 those underlying 35 cases that were sought to be collected
8 together, so it's more than just three. There were two
9 cases --

10 THE COURT: But isn't it the docket that lists all
11 those cases?

12 MR. TANNEN: Yes, it is, and the Complaints.

13 THE COURT: Because one's an MDL, so I understand.

14 MR. TANNEN: So the MDL captures the other 35
15 umbrella.

16 THE COURT: I think so. Yeah, I think it does.

17 MR. TANNEN: Okay. I also wanted to advise the
18 Court that we are continuing our investigation as to the
19 prepetition relationship prong that you mentioned before.
20 We believe -- we are collecting evidence, and I will, of
21 course, share it with Transform and Old Sears that, in fact,
22 Diana Arney did not physically buy the dryer at issue, nor
23 did she pay for it. She may have been an intended user, but
24 we do not think she was the actual person who bought it, and
25 I will give that evidence over to Mr. Barefoot when I get

1 it.

2 Again, I am moving as quickly as possible to get
3 that information and I will share it, and if that's
4 something we have to investigate and go through discovery,
5 we will.

6 THE COURT: Okay. Well, I had assumed that I
7 would get a pretrial order fairly soon after that hearing,
8 and it's now been a month. I just want to make sure as to
9 Transform, the Arney litigation is still not going forward,
10 right?

11 MR. BAREFOOT: That's correct.

12 MR. TANNEN: The litigation is not going forward
13 as to the successor liability discovery or the amendment of
14 the pleadings.

15 Your Honor, a couple of other things. Mr.
16 Barefoot, Ms. Marcus, and I had conversations. Mr. Barefoot
17 is requesting that I serve all the discovery at once upon
18 him. I understand. The logistical issue I'm encountering
19 with Old Sears is they assert that they don't have anyone to
20 sign interrogatories or attest to the completeness of
21 production requests.

22 I hope that that's not going to be a problem
23 because I think they have a duty to find somebody to attest
24 to the accuracy and completeness of discovery that we might
25 tender. I'm just alerting the Court that's an issue that's

1 out there currently.

2 THE COURT: Okay. Well, I'm not sure what you
3 will be able to get from Sears because I think Transform has
4 those records at this point, but you can discuss that with
5 opposing counsel.

6 MR. TANNEN: I shall.

7 MS. MARCUS: Your Honor, if I may be heard for
8 just a moment. At the last hearing, I know the Debtors
9 concern about the administrative expenses that might pile up
10 if Ms. Arney pursues extensive discovery from the Debtors.

11 Recently, maybe about a week or so ago, Mr. Arney
12 provided notice that she's serving a subpoena on Sedgwick
13 Claims Management, which provides insurance services for the
14 Debtors. The information sought is quite extensive. For
15 example, she seeks information for the period between 2002
16 and the present -- that's almost 20 years -- regarding
17 claims and notices related to fires involving these dryers.

18 We believe that Sedgwick will be able to assert a
19 claim back against the Debtors for their expenses associated
20 with complying with that discovery.

21 So we'll talk to Mr. Tannen, but I just wanted to
22 alert you to that.

23 THE COURT: Okay. I mean, there are really two
24 issues within that: one is the breadth of the discovery
25 sought, which comes up often in litigation; the other is

1 whether Sedgwick has any records that would be responsive.

2 And again, it seems to me that -- I understand,
3 Mr. Tannen, you want to make sure that Old Sears doesn't
4 have records, but that is an interrogatory that I believe
5 Sears can complete and attest to. I don't know about
6 Sedgwick. I don't know what they have, and that may just be
7 a question of burdensomeness, but that's a separate issue.

8 So I can understand I guess why I haven't gotten
9 the pretrial order yet. There's still some work to be done
10 among the lawyers.

11 MR. TANNEN: And, Your Honor, with respect to the
12 subpoena to Sedgwick James, we attached the cases that were
13 insurance subrogation cases, and we've attached all the list
14 of subrogors by address, name, date of loss. So I believe
15 that this information is Sedgwick James -- or Sedgwick
16 Management still has the documents, are readily findable
17 because I gave them the list of cases. They may or -- some
18 of them have to involve Kenmore dryers and we'll see.

19 But I'll work with everyone. I don't want to
20 burden anybody with anything.

21 THE COURT: Okay. All right.

22 MR. TANNEN: I'm reasonable.

23 THE COURT: Okay, very well. So I'll look for the
24 order, Mr. Tannen, and either you or Mr. Barefoot can submit
25 it. You obviously need to cc the other person and Ms.

1 Marcus on it. It should be consistent with my ruling.

2 Again, it's clear to me that notice, judicial
3 notice being taken of the three lawsuits and the dockets in
4 the lawsuits is appropriate here for the issue of the
5 Debtors' knowledge that I identified during the hearing in
6 reference to the Motors Liquidation case back on September
7 27, but not more than that. I mean, not for the assertions
8 in the pleadings, but rather just for the fact of the
9 litigations and the dockets. See *Beauvoir v. Israel*, 794
10 F.3d 244, 248 (2d Cir. 2015) and *Shank v. Citibank*,
11 *Citigroup, Citicorp.*, 2010 WL 5094360 at page 2 (S.D.N.Y.,
12 Dec. 9, 2010) and the large number of cases that cited that
13 decision.

14 And then I'll decide, if this ever goes to a
15 hearing, what to make of the specific docket entries that
16 I'm assuming someone will point to me as to the knowledge of
17 Sears of these types of claims at the appropriate time. See
18 also *Roth v. Jennings*, 489 F.3d 499, 509 (2d Cir. 2007).

19 So I'll look for that order.

20 MR. TANNEN: I'll prepare the order and circulate
21 it, and I apologize for using the word nothingburger. I
22 haven't used it in 31 years, but it should be in Black's Law
23 Dictionary Urban Edition.

24 THE COURT: Okay, very well.

25 MR. TANNEN: Thank you, Your Honor.

1 THE COURT: Okay. All right. I think that
2 concludes the omnibus hearing agenda for today, so I'll be
3 signing off at this point.

4 MS. MARCUS: Thank you, Your Honor.

5 THE COURT: Okay.

6 (Whereupon these proceedings were concluded at
7 11:02 AM)

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C E R T I F I C A T I O N

I, Sonya Ledanski Hyde, certified that the foregoing
transcript is a true and accurate record of the proceedings.

A handwritten signature in dark ink, reading "Sonya M. Ledanski Hyde". The signature is written in a cursive, flowing style.

Sonya Ledanski Hyde

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Date: October 29, 2021